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No. 92-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Waterman Steamship Corporation, *in personam* and the Vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, *in rem*,

Petitioners,

—against—

RAPHAELY INTERNATIONAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH C. SMITH
One Battery Park Plaza
New York, New York 10004
(212) 422-7585
Counsel of Record

December 15, 1992

QUESTION PRESENTED

Whether aflatoxin, a potent carcinogen, naturally and unavoidably present in agricultural food products, is an inherent vice under the Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(m), exempting a carrier from liability for a shipment of an agricultural food containing aflatoxin determined by the United States Department of Agriculture to be in excess of the aflatoxin tolerance level for importation into the United States.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Waterman Steamship Corporation[1] *in personam* and the vessels STONEWALL JACKSON, BENJAMIN HARRISON, and ROBERT E. LEE and their engines, boilers, etc., *in rem* and the respondents Raphaely International, Inc.; Via Assurance Nord Monde; L'Europe; Navigation & Transport; G.F.A.; Chasyr; Nieuw Rotterdam; Q.B.E.; Parisienne De Garantie; Black Sea and Baltic; Boreas; Allianz; Alpina; L'Alsacienne; Ancienne Mutuelle; Ass. Generales Phenix; Astree; C.A.M.A.T.; Le Continent; Languedoc; Rhin & Moselle; Lloyd Continental; Nantaise; Assurances Nationales; New Hampshire; Reunion Europeenne; Reunione Adriatica; Skandia; Assurances Generales; Nouvelle D'Assurance; and Independance.

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1 Waterman Steamship Corporation is a wholly owned subsidiary of International Shipholding Corporation, a publicly owned corporation whose shares are listed and traded on the New York Stock Exchange.

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No. ____

Waterman Steamship Corporation, *in personam* and the Vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, *in rem*,

Petitioners,

—against—

Raphaely International, Inc., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Waterman Steamship Corporation, *in personam*, and the Vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, and their engines, boilers, etc., *in rem*, respectfully pray, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding on August 14, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 972 F.2d 498 and is reprinted in the appendix hereto, p. 1a, *infra*.

The amended Opinion and Order of the United States District Court for the Southern District of New York (Honorable Richard Owen, D.J.) is reported at 1992 A.M.C. 830, [Not otherwise reported]. It is reprinted in the appendix hereto, p. 13a, *infra*.

JURISDICTION

Invoking federal admiralty and maritime jurisdiction under 28 U.S.C. §1331(1) for a claim for damage to cargo carried by petitioners under a bill of lading incorporating the Carriage of Goods by Sea Act, 46 U.S.C. §1300 *et seq.* ("COGSA"), respondents brought this action in the United States District Court for the Southern District of New York. On February 20, 1992, the District Court held petitioners liable under COGSA for respondents' losses. See p. 25a, *infra*.

On petitioners' appeal, under 28 U.S.C. §1292(a)(3), the Court of Appeals for the Second Circuit on August 14, 1992 entered a judgment and opinion affirming the District Court judgment. See p. 12a, *infra*. On August 27, 1992, Petitioners filed a Petition for Rehearing, which the Second Circuit denied on September 17, 1992, see p. 28a, *infra*.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

46 U.S.C. §§1300-1315—Carriage of Goods by Sea Act See p. 32a, *infra*.

STATEMENT OF THE CASE

Petitioner Waterman Steamship Corporation, sued *in personam*, is a common carrier who owned the vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, sued *in rem* by the respondents for aflatoxin found by the United States Department of Agriculture ("USDA") in shipments of peanuts loaded in Port Sudan and discharged in the United States. The peanut lots tested by USDA were determined to exceed the tolerance level of twenty five parts per billion ("ppb") for aflatoxin allowed for importation of peanuts and were denied entry until the aflatoxin contaminated peanuts were removed from the shipments and the aflatoxin level reduced to comply with the USDA tolerance.

Aflatoxin is a potent carcinogen "naturally and unavoidably present in some foods . . .". *Young v. Community Nutrition Institute*, 476 U.S. 974, 978 (1986). Aflatoxin was first discovered in the early 1960's following the outbreak of "Turkey X Disease" in England, an epidemic affecting turkey flocks which had been fed aflatoxin contaminated peanut meal from Brazil. A16a. Aflatoxin is produced from a spore while agricultural products are still in the field prior to harvest or at any time after harvest. A16a. It may be produced in twenty four hours when the temperature is in the range of 50 degrees to 109 degrees fahrenheit and the relative humidity from 80% to 85%. A16a. It cannot be detected by visual inspection of a food product. It is a hidden defect.

The District Court held petitioners responsible for respondents' losses under the Carriage of Goods by Sea Act, 46 U.S.C. §1300-§1315 in that the respondent made out a *prima facie* case by proving that aflatoxin levels in the peanut were non-existent or minimal prior to loading the peanuts at Port Sudan and that the damaged condition of the peanuts was established on arrival in the United States by the inspections and rejections issued by the USDA. A22a. Three thousand tons of peanuts rejected by USDA for aflatoxin exceeding the twenty five ppb tolerance level, were processed to remove

the contaminated peanut kernels and then imported. Between ten and twenty peanut kernels contaminated with aflatoxin in a thousand kernels will cause tolerance levels to exceed twenty five ppb.

Petitioners' claimed in the Courts below that aflatoxin is an inherent vice which falls within the carrier's and ship's exemption from liability under the Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(m). Both the District Court and Court of Appeals accepted that "under §1304(2), neither the carrier nor the ship is responsible for loss or damage arising from an inherent vice of the goods." A11a, 23a.

The district court, rejecting petitioners' claim defined inherent vice as:

> any existing defect, disease, decay or the inherent nature of the commodity which would cause it to deteriorate over a lapse of time,

(citing *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 136 (1964)) and concluded that the development of aflatoxin was not caused by any existing defect or inherent vice. A23a.

Affirming the district court's judgment the Second Circuit said:

> The district court heard evidence that peanuts were susceptible to disease, but no evidence was introduced that peanuts are a commodity which will deteriorate with a lapse of time. As the district court correctly noted, the fact that a cargo may be susceptible to disease does not amount to an inherent vice. *See Vana Trading Co.*, 556 F.2d at 104. We, therefore, find that peanuts do not suffer from an inherent vice.

A12a.

Both courts invoked the last part of the definition accepted by this Court to conclude that aflatoxin is not an inherent vice.

Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. at 136.

The application of that last part of the definition, requiring that a commodity be one "which will deteriorate with a lapse of time" would preclude a carrier's immunity under COGSA for "any other loss or damage arising from inherent defect, quality, or vice of the goods," 46 U.S.C. §1304(2)(m), which does not "deteriorate with a lapse of time."

A conclusion that aflatoxin is an inherent vice would have required dismissal of the complaint. A11a.

REASON FOR GRANTING THE WRIT

1. The Second Circuit's application of the definition of inherent vice is in conflict with the Seventh Circuit's application and in conflict with COGSA, 46 U.S.C. § 1304(2)(m).

Without regard for the specific immunities granted the carrier and ship by COGSA for "loss or damage arising from inherent defect, quality, or vice of the goods," the Second Circuit affirmed the District Court's conclusion that aflatoxin is not an inherent vice of peanuts. A12a. To arrive at that point in its opinion, the District Court relied on the definition of inherent vice accepted by this Court for a case decided under the Carmack Amendment of 1906 of the Interstate Commerce Act, 49 U.S.C. §20(11)(current version at 49 U.S.C. §11707), *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. at 136. A23a. That definition flows from one of the Carmack excepted perils as set forth by this Court:

> (e) or the inherent vice or nature of the goods.

Id. at 137. The definition does not restrict the meaning of inherent vice to "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." *Id.* at 139. That disjunctive phrase beginning with the word "or" is

included in the definition of inherent vice which also encompasses "any existing defects, diseases, decay." *Id.* at 136.

The Seventh Circuit gave full meaning to and did not restrict the definition of inherent vice to commodities "which deteriorate with the lapse of time" when affirming a district court which held that the sheared or loose dowels in a piece of heavy machinery was an inherent vice which caused damage to the machinery in transit. *Mulay Plastics, Inc. v. Grand Trunk Western R. Co.*, 822 F.2d 676, 682-83 (7th Cir. 1987).

There is no requirement under COGSA that a commodity must have the propensity to "deteriorate with a lapse of time" as a condition for the presence of an inherent vice as held by the Second Circuit. The phrase is pertinent to only those cargoes where "the cause of the spoilage was the natural tendency of the commodities to deteriorate." *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. at 135. The carrier's immunities granted by COGSA were intended to include perishables as well as non-perishable goods. In the latter, the burden of proof is on the carrier that the spoilage was caused by "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." *Id.* at 136. If a commodity does not deteriorate with a lapse of time, it may still have an inherent defect or vice.

The standard applied by the Second Circuit is in sharp conflict with the standard applied by the Seventh Circuit. The Second Circuit standard has no basis in the exceptions specified in COGSA.

The drafters of the Hague Rules, and Congress in enacting them, intended that a carrier and ship be protected from liability for a hidden potent carcinogen "naturally and unavoidably present" in a cargo it carried. The Second Circuit decision affirming the District Court defeats that intention.

2. Uniformity in the application of COGSA to goods moving from one jurisdiction to another is required to ensure that the interested parties conduct their maritime transactions to conform to the governing law.

COGSA is Congress' enactment of the Hague Rules.

> "The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233. (Footnote omitted). The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade.

Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 301 (1959). One of the dominant objectives of Congress was to ensure uniformity in the basic rights and responsibilities arising out of bills of lading. H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936).

Cargoes valued at hundreds of billions of dollars are carried by vessels in the foreign trade to and from the United States each year. Bureau of Census, Commerce Dept., U.S. Waterborne Imports/Exports Annual Reports for 1986. All are governed by COGSA. 46 U.S.C. §1300. Most shipments involve a shipper, cargo insurer and carrier. Each must be able to determine his rights and liabilities in the transportation of the shipment. The bill of lading and COGSA determine those rights and liabilities as between the carrier and the shipper. The insurance policy covering the shipment issued to the shipper by the cargo insurer determines the conditions for payment in the event of loss. The allocation of loss must be known before the shipment is made in order that the risk of loss can be insured by the one who will bear the loss.

The risk of inherent vice in a cargo is an exception under COGSA and it is an excluded risk under the standard marine cargo insurance policy. The risk of loss from an inherent vice is therefore on the shipper who is the one best qualified to avoid that risk. Respondents Raphaely, fearing rejection by

USDA for aflatoxin in excess of the tolerance level and understanding that rejection for aflatoxin would not be covered under the standard marine policy, arranged rejection insurance with Respondent underwriters who accepted and undertook for a premium to insure the risk of rejection by USDA for aflatoxin in excess of the tolerance levels.

The Second Circuit decision, using an improper standard restricting the definition of inherent vice, shifted the loss from respondent underwriters to the carrier and created uncertainty in the international community as to the extent of liability of a carrier for hidden defects in cargo and for marine cargo insurers who now cannot determine the extent of the marine risk being insured. The decision creates a new allocation of risk, which Congress and the drafters of the Hague Rule did not intend.

CONCLUSION

It is respectfully requested that this Court grant the petition for a writ of certiorari for the above stated reasons.

Respectfully submitted,

JOSEPH C. SMITH
One Battery Park Plaza
New York, New York
10004
(212) 422-7585

Counsel of Record

Dated: December 14, 1992

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1839—August Term, 1991

(Argued: July 15, 1992 Decided: August 14, 1992)

Docket No. 92-7393

RAPHAELY INTERNATIONAL, INC.; VIA ASSURANCE NORD MONDE; L'EUROPE; NAVIGATION & TRANSPORT; G.F.A.; CHASYR; NIEUW ROTTERDAM; Q.B.E.; PARISIENNE DE GARANTIE; BLACK SEA AND BALTIC; BOREAS; ALLIANZ; ALPINA; L'ALSACIENNE; ANCIENNE MUTUELLE; ASS. GENERALES PHENIX; ASTREE; C.A.M.A.T.; LE CONTINENT; LANGUEDOC; RHIN & MOSELLE; LLOYD CONTINENTAL; NANTAISE; ASSURANCES NATIONALES; NEW HAMPSHIRE; REUNION EUROPEENNE; REUNIONE ADRIATICA; SKANDIA; ASSURANCES GENERALES; NOUVELLE D'ASSURANCE; and INDEPENDENCE,

Plaintiffs-Appellees,

—v.—

WATERMAN STEAMSHIP CORPORATION, *in personam*, and the Vessels STONEWALL JACKSON; BENJAMIN HARRISON, and ROBERT E. LEE, and their engines, boilers, etc., *in rem*,

Defendants-Appellants,

SOCIETE GENERALE DE SURVEILLANCE, S.A.,

Defendant.

Before:

ALTIMARI and WALKER, *Circuit Judges*,
and SPRIZZO, *District Judge*.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Owen, *J.*), holding appellants liable under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315, for negligently transporting plaintiff's cargo.

Affirmed.

JOHN C. SMITH, New York, New York (Burlington Underwood & Lord, New York, New York, of counsel), *for Defendants-Appellants*.

LOUIS G. JULIANO, New York, New York (Frederick A. Lovejoy, Bigham Englar Jones & Houston, New York, New York, of counsel), *for Plaintiff-Appellee*.

* Hon. John E. Sprizzo, United States District Court for the Southern District of New York, sitting by designation.

ALTIMARI, *Circuit Judge*:

Defendants-appellants Waterman Steamship Corporation, S/S STONEWALL JACKSON, S/S BENJAMIN HARRISON, and S/S ROBERT E. LEE (collectively "Waterman") appeal from a judgment of the United States District Court for the Southern District of New York (Owen, *J.*), entered after a fourteen day non-jury trial, holding them liable for cargo losses sustained by Raphaely International, Inc. ("Raphaely"). The district court found that Waterman had received Raphaely's cargo of peanuts in good order, but failed to deliver it in an acceptable condition.

On appeal, Waterman argues that the district court erred in admitting into evidence certificates pertaining to the condition of Raphaely's peanuts issued by Gezira Trade & Services, Ltd. ("Gezira"), a company owned by the Sudanese government charged with inspecting exports. Gezira issued these certificates in its capacity as the agent of Societe Generale de Surveillance, S.A. ("SGS"), a Swiss company which controls a network of local inspection, testing, and certification services in a number of different countries. Raphaely claimed that it hired SGS to oversee the testing of its peanuts. However, according to Waterman, Gezira's certificates were inadmissible both because they had not been authenticated as required by Rule 902(3) of the Federal Rules of Evidence and because they were hearsay.

Waterman also maintains that a number of the district court's findings of fact, concerning, for example, the seaworthiness of its vessels and the moisture content of the peanuts, were clearly erroneous. Finally, Waterman contends that the district court erred in finding that aflatoxin, a carcinogenic substance produced during the growth of

the mold *Aspergillus Flavus*, which is often found in peanuts, is not an "inherent vice" in peanuts as defined by the Carriage of Goods by Sea Act ("COGSA"). *See* 46 U.S.C. § 1304(2)(m).

For the reasons set forth below, we affirm.

BACKGROUND

In 1980 a severe drought in the Southeastern United States caused a shortage of peanuts. Seizing upon the economic opportunity that this shortage created, Raphaely, a commodity trader, purchased several thousand tons of Sudanese peanuts for resale in the United States. Under its purchase contract, Raphaely was responsible for arranging the transportation of the peanuts from Sudan to the United States.

Raphaely entered into a contract with Waterman to ship the peanuts aboard Waterman's Lighter Aboard Ship ("LASH") vessels from Port Sudan to Norfolk, Virginia. LASH vessels are equipped with a built-in crane capable of lifting LASH barges out of the water and loading them into the hold or onto the deck of the "mother ship." The system permits the mother ship to stop at a port and pick up barges that have been previously loaded. Raphaely believed that the use of LASH barges and vessels would shorten the time required for delivery of its peanuts.

Before being loaded onto the LASH vessels, the peanuts were inspected, as required by Sudanese law, by the Sudanese National Analytical & Quality Control Laboratories ("Sudanese National Laboratory") and found to be "aflatoxin nil." These findings were incorporated by Gezira, the agent of SGS, into certificates of inspection which had attached to them copies of the Sudanese

National Laboratory's findings. Gezira also issued order bills of lading for each barge stating that the goods were "received in apparent good order and condition."

When the peanuts arrived in the United States they were inspected by the United States Department of Agriculture. The Department of Agriculture rejected all of the peanuts either because of aflatoxin contamination or beetle infestation. At a later inspection, all of the barges were found to have excessive levels of aflatoxin.

Raphaely filed suit on September 21, 1982, claiming that Waterman was liable for Raphaely's damages under COGSA. Raphaely's complaint also charged SGS with negligently sampling, surveying, and testing the quality and condition of the cargo.

Evidence at trial indicated that after the barges were loaded at Port Sudan, they were towed offshore to a fleeting area to await the arrival of the mother vessel. These barges sat in the fleeting area for several days. The district court found that the barges were subject to temperatures that were well within the range necessary to produce aflatoxin. Indeed, according to one witness, the decks of the barges were "too hot to walk on." The hulls, on the other hand, sat in cool ocean water. Expert testimony at trial indicated that the temperature gradients that resulted allowed for "moisture migration." The district court found that combined with the entry of water into the barges through leaking hatch covers and halls, moisture migration resulted in moisture levels that permitted the production of aflatoxin.

The LASH barges were off-loaded at Norfolk, Virginia in May, 1981, but testimony at trial indicated that the peanuts remained in the harbor between five and eighteen days before being unloaded. Evidence at trial also

revealed that several of the barges contained standing water, and stained or wetted bags showing mold or mildew.

After a fourteen day non-jury trial, the district court (Owen, *J.*) held that Waterman was responsible for the damage suffered by Raphaely. Liability was imposed under § 1303(1) of COGSA, for failing to exercise "due diligence" in: (1) making the ship seaworthy; (2) properly "equip[ping] and supply[ing] the ship"; and (3) making the holds "fit and safe for the reception, carriage, and preservation" of the goods. Waterman was also held liable under § 1303(2) of COGSA for failing "properly and carefully" to "load, handle, stow, carry, keep, care for, and discharge the goods carried." The district court dismissed Raphaely's claim against SGS, finding that Gezira, not SGS, issued the inspection certificates, and that no contract existed between Raphaely and SGS. In dismissing this claim, the court also noted that Gezira's inspection of the peanuts was proper.

Waterman now appeals.

DISCUSSION

I. *Authenticity of Foreign Documents*

On appeal, Waterman first contends that the district court erred in admitting into evidence the certificates of inspection issued by Gezira. According to Waterman, these certificates were not properly authenticated pursuant to Fed. R. Evid. 902(3). Waterman further argues that these certificates were hearsay evidence that should have been excluded. These contentions are without meri

To establish its *prima facie* case under COGSA Raphaely needed to prove: "(1) delivery of the goods to

the carrier in good condition and (2) outturn by the carrier in damaged condition." *Westway Coffee Corp. v. M.V. Netuno*, 675 F.2d 30, 32 (2d Cir. 1982). In order to prove that the peanuts were damaged while in Waterman's custody, Raphaely introduced into evidence certificates of inspection issued by SGS's agent, Gezira. These certificates incorporated the findings of the Sudanese National Laboratory and attested to the good order and condition of the peanut cargoes prior to loading. Waterman claims that the district court erred in finding these certificates to be authentic. We review the district court's finding of authenticity under the abuse of discretion standard. *See, e.g., United States v. Chu Kong Yin*, 935 F.2d 990, 994 (9th Cir. 1991).

Rule 902(3) of the Federal Rules of Evidence provides that extrinsic evidence of authenticity is not required as a condition precedent to admitting foreign public documents into evidence. Initially, we observe that the certificates at issue are "foreign public documents." Gezira, having been nationalized by the Sudanese government, is a governmental entity engaging in inspection work that is required by Sudanese law, and the certificates issued by it are accordingly foreign public documents for purposes of Fed R. Evid. 902(3). *See United States v. Regner*, 677 F.2d 754, 758 n.3 (9th Cir.), *cert denied*, 459 U.S. 911 (1982) (affirming the district court's holding that records of the state-owned Hungarian taxicab company were foreign public documents). Rule 902(3) provides that a properly executed or attested foreign public document must be accompanied by a final certification of genuineness from an authorized government official. Where a foreign public document is not certified, Rule 902(3) provides that the document may be "treated as presumptively authentic" if two conditions are satisfied: (1) the parties have been

"given reasonable opportunity . . . to investigate the authenticity and accuracy" of the document; and (2) there is a showing of "good cause".

In the case at bar, there was no final certification of the documents at issue. Therefore, the two conditions for treatment of a non-certified foreign public document must be satisfied.

Waterman had nine years preceding trial to challenge the authenticity of these certificates. This time period provided Waterman with a reasonable opportunity to investigate the authenticity and accuracy of the certificates, satisfying the first condition for excuse of the certification requirement. The second prerequisite to excuse of the certification requirement was satisfied by Waterman's delay in challenging the documents and its Waterman's failure to adduce at trial any evidence casting doubt upon the certificates' authenticity. This provided the district court with a basis for finding "good cause" to treat the certificates as presumptively authentic. *See, e.g., United States v. De. Jongh*, 937 F.2d 1, 5 (1st Cir. 1991) ("Where the adversary, despite a fair chance to examine into the document's bona fides, casts no serious doubt on its authenticity, a finding of good cause can much more readily eventuate."); *Black Sea & Baltic Gen. Ins. Co. v. S.S. Hellenic Destiny*, 575 F. Supp. 685, 692 (S.D.N.Y. 1983) (finding good cause where litigation had been proceeding for nine years and no evidence was produced casting doubt upon validity of proffered public documents). Therefore, the court did not abuse its discretion in finding that these certificates were authentic. *See Black Sea*, 575 F. Supp. at 692.

II. *Admissibility of Certification*

Waterman also claims that these certificates were inadmissible hearsay. However, these certificates were business records made and kept in the course of a regularly conducted business activity. As such they fall under the business records exception to the hearsay rule, and can be admitted into evidence with the proper foundation. Fed. R. Evid. 803(6); *see also Saks Int., Inc. v. M/V Export Champion*, 817 F.2d 1011, 1013-14 (2d Cir. 1982).

In order to provide the proper foundation for the admission of Gezira's certificates into evidence, Colin Kay, a chemist in charge of quality control at SGS's El Sheikh laboratory where the peanuts were inspected, testified that he was entirely familiar both with Gezira's operations and the signatories of the inspection certificates. Kay further testified that the Gezira certificates were made in the regular course of Gezira's business activity as agent for SGS. Finally, Kay described how the peanuts were processed, sampled, inspected, and tested, thereby indicating that the records had sufficient indicia of trustworthiness to be considered reliable, which is the most important precondition to admission under Fed. R. Evid. 803(6). *Id.* at 1013.

Waterman nevertheless argues that Kay's testimony did not lay the proper foundation. We reject this contention. In providing the foundation for admission of these certificates under Rule 803(6) it is irrelevant that Gezira was not a party to this lawsuit. *See Id.* Likewise, it is irrelevant that the foundation for this evidence was laid by an employee of SGS rather than an employee of Gezira's. *Id.* at 1013-14. Therefore, Kay's testimony laid the proper foundation for the admissibility of the certificates into evidence, and we find that the district court did not abuse

its discretion in allowing them into evidence pursuant to Rules 902(3) and 803(6).

III. *The District Court's Findings of Fact*

Waterman next challenges a number of the district court's findings of fact concerning, for example, the seaworthiness of Waterman's vessels and the moisture content of the peanuts. These challenges are unpersuasive

A district court's factual determinations will not be disturbed unless "clearly erroneous." *See* Fed R. Civ. P. 52(a); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1550 (2d Cir. 1991). "A finding is 'clearly erroneous' when, considering the entire record, the reviewing court is 'left with a definite and firm conviction that a mistake has been committed.' " *McNeil-P.C.C., Inc.*, 938 F.2d at 1550 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (citation omitted)). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74.

The district court conducted a fourteen day bench trial, which resulted in a trial transcript of more than 1300 pages and the admission of hundreds of exhibits into evidence. Viewed in its entirety, the record on appeal contains ample evidence to support the district court's findings of fact. For example, the court heard testimony from a marine surveyor that almost all of the peanut cargoes carried in LASH barges from many different locations and shippers had been rejected for excessive levels of aflatoxin. This surveyor also testified that several of the barges in question contained either water, or stained

and wetted bags. The court therefore had ample reason to conclude that these barges were unseaworthy because they were not "reasonably fit to carry the cargo which [Waterman had] undertaken to transport." *The Silvia*, 171 U.S. 462, 464 (1898). The court also heard testimony concerning the conditions to which these barges were subjected, indicating that because of "moisture migration," the peanuts were ripe for the production of aflatoxin. After hearing the conflicting testimony and carefully reviewing the record, the district court reasonably concluded that the damage to Raphaely's peanuts occurred while they were in Waterman's care.

IV. *The Finding of No Inherent Vice*

Finally, Waterman claims that even if the peanuts were damaged during shipment, liability under COGSA was improperly imposed, because the district court erred in finding that peanuts do not suffer from an "inherent vice." This contention is without merit.

Once Raphaely had proven its prima facie case, the burden shifted to Waterman to show that the loss or damage fell within one of the COGSA exceptions set forth in 46 U.S.C. § 1304(2). *See Vana Trading Co. v. S.S. Mette Skou*, 556 F.2d 100, 105 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977). Under § 1304(2) neither the carrier nor the ship is responsible for loss or damage arising from an inherent vice of the goods.

An "inherent vice" is defined as "any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." *Vana Trading Co.*, 556 F.2d at 104 (citation omitted). Whether a particular commodity suffers from an inherent vice is a mixed question of law and fact and as such is

open to full review. *See, e.g., Puma Indust. Consulting, Inc. v. Daal Assocs., Inc.*, 808 F.2d 982, 986 (2d Cir. 1987).

The district court heard evidence that peanuts were susceptible to disease, but no evidence was introduced that peanuts are a commodity which will deteriorate with a lapse of time. As the district court correctly noted, the fact that a cargo may be susceptible to disease does not amount to an inherent vice. *See Vana Trading Co.*, 556 F.2d at 104. We therefore find that peanuts do not suffer from an inherent vice.

CONCLUSION

We have examined each of appellants' remaining arguments and find them to be without merit. In light of the foregoing, the district court's judgment is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 CIV. 6284 (RO)

RAPHAELY INTERNATIONAL, INC., et al.

Plaintiffs,

—V.—

WATERMAN STEAMSHIP CORPORATION, et al.

Defendants.

AMENDED OPINION AND ORDER

Appearances

Attorney for Plaintiff Raphaely International, Inc. et. al., Bigham Englar Jones & Houston, 14 Wall Street, 22nd Floor, New York, New York 10005. Of Counsel: Louis G. Juliano, Frederick A. Lovejoy.

Attorney for Defendant Waterman Steamship Corporation, Burlingham Underwood & Lord, One Battery Park Plaza, New York, New York 10004. Of Counsel: Joseph C. Smith

Attorney for Defendant Societe Generale de Surveillance, S.A., Schoeman, March & Updike, 60 East 42nd Street, New York, New York 10165. Of Counsel: Charles B. Updike

OWEN, *District Judge*:

This action arises out of shipments of contaminated peanuts from the Sudan to Norfolk, Virginia during the spring of 1981. In 1980 and 1981, due to a severe drought and shortage of peanut production in the United States, Presidents Carter and Reagan issued executive orders raising the import quotas to approximately 300,000,000 pounds of peanuts to be imported before June 30, 1981.[1] Plaintiff Raphaely International, Inc. ("Raphaely"), a now defunct commodity trading firm based in Edina, Minnesota,[2] entered into contracts with Agrimpex Co., Ltd., ("Agrimpex") for the purchase of 4460 metric tons of Sudanese peanuts.[3] Agrimpex, in turn, purchased the peanuts from two Sudanese peanut producers, El Sheikh Mustafa El Amin & Sons Ltd. ("El Sheikh") and Omer Osman Mahomed Salef ("Omer Osman").[4]

Pursuant to its contracts with Agrimpex, Raphaely was responsible for arranging the shipment of the nuts from the Sudan to the United States. Raphaely entered into a contract of carriage with defendant Waterman Steamship Corporation ("Waterman"), an American flag shipping line, for the shipment of its peanuts aboard three of Waterman's LASH[5] vessels,

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1 Ordinarily, the United States is a net exporter of peanuts and the importation of peanuts into the United States is subject to very strict import quotas.

2 Raphaely was a wholly owned subsidiary of Leo Raphaely & Sons, a South African corporation, and was a sister corporation of Raphaely Trading U.K. Limited.

3 On November 13 and 14 and December 31, 1980, Raphaely entered into Contract Nos. 4213, 4217 and 4318, respectively, which were for a total of 4,000 metric tons of peanuts with 3,000 tons at $1,600 per ton and 1,000 tons at $1,865 per ton. On March 17 and April 19, 1981, Raphaely entered into Contract Nos. 4440 and 4484 which were for a total of 460 metric tons at $1,900 per ton.

4 Agrimpex acted as a middleman, selling the peanuts to Raphaely short and later covering its position by purchasing the peanuts from the Sudanese producers.

5 LASH is an acronym for Lighter Aboard Ship. LASH vessels are equipped with a built in crane capable of lifting LASH barges out of the water and loading them into the hold or onto the deck of the "mother" ship. The sys-

the Stonewall Jackson, the Benjamin Harrison and the Robert E. Lee. Upon arrival of the vessels at Norfolk, the peanuts were inspected by the United States Department of Agriculture (USDA) and all of the peanuts were rejected either because of aflatoxin[6] contamination or Khapra beetle infestation.[7]

Raphaely and its subrogated insurers,[8] Via Assurances, I.A.R.D. "Nord Et Monde", et. al., (collectively referred to as "Raphaely") assert claims in admiralty against Waterman and its vessels pursuant to the Carriage of Goods by Sea Act (COGSA, 46 U.S.C. § 1300 et. seq., for failure to deliver the peanuts in good order. Raphaely also asserts claims of breach of contract and negligence against Societe Generale de Surveillance, S.A. ("Societe"), a Swiss company located in Geneva which performs services for the SGS group of companies, a network of local inspection, testing and certification services in many different countries, allegedly involved in the inspection of these peanuts. The liability phase of the bifurcated trial was tried before me from June 17, 1991 to July 11, 1991.

All of the Sudanese peanuts purchased by Raphaely were found to contain high levels of aflatoxin after transport. The levels ranged from 78 p.p.b.—parts per billion—to 322 p.p.b. with an average of 185 p.p.b.[9] A principal issue at trial was to

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tem permits the "mother" ship to stop at a particular port and pick up barges that have been previously loaded. Pursuant to this system, the peanuts in issue were first loaded into LASH barges in Port Sudan, the barges were then towed offshore and assembled in fleeting areas along with other barges and subsequently loaded aboard the three LASH vessels for overseas shipment.

6 Aflatoxin is a carcinogenic substance excreted during the growth of the mold *Aspergillus Flavus* which is often found in peanuts. United States guidelines regulating the importation of peanuts prohibit the entry of cargo containing levels of aflatoxin in excess of 25 parts per billion (p.p.b.).

7 The five barges which were rejected because of Khapra beetle infestation were transshipped to Rotterdam without first being sampled and tested for aflatoxin. Upon arrival in Rotterdam, these peanuts were tested and were also found to have excessive levels of aflatoxin.

8 Plaintiffs, subrogated underwriters, issued full rejection insurance coverage to Raphaely for the Sudanese peanuts. Following arbitration, the underwriters paid Raphaely in full for its covered losses.

9 The peanuts which were tested in Rotterdam contained aflatoxin levels ranging from 38 p.p.b. to 570 p.p.b. with an average of 155 p.p.b. Because

determine *when* these high levels of aflatoxin developed. Plaintiff contends that some aflatoxin existed in the peanuts prior to their being loaded on board the Waterman vessels and that some aflatoxin developed in the peanuts after they were loaded on board the barges, while the barges sat at the loading dock in Port Sudan and during the voyage across the Atlantic. Waterman claims that the aflatoxin developed in the field prior to the peanuts being harvested or while the peanuts sat in the warehouse at Port Sudan. Societe contends that the aflatoxin developed after the peanuts were loaded into the LASH barges.

At trial the parties presented expert testimony on the development of aflatoxin in peanuts. From this it appears that aflatoxins were discovered in the early 1960s following the outbreak of "Turkey X Disease" in England, an epidemic affecting turkey flocks which had been fed contaminated peanut meal imported from Brazil. Aflatoxins are carcinogenic substances produced as chemical by-products during the growth of the mold *aspergillus flavus*. The spores of this mold are present throughout the environment and, given the appropriate conditions, will germinate into the mycelium, the body of the mold, which grows and produces aflatoxin. Aflatoxin can be produced while the peanuts are still in the field prior to harvest or at any time after harvest so long as the appropriate conditions are present. The five factors necessary for mold growth and aflatoxin development are: (1) a proper substrate, such as a peanut; (2) mold spores; (3) adequate kernel moisture content; (4) appropriate temperature; and (5) oxygen. In order for aflatoxin to develop, each of these factors must be present within certain appropriate ranges. Peanuts are hygroscopic, which means that depending on their moisture content in relation to the relative humidity, the peanut kernels will either absorb moisture from or release moisture into the atmosphere, so as to reach an equilibrium with the environment. The temperatures necessary for aflatoxin production range from about 50 degrees to 109 degrees fahrenheit, with the optimum range of about 77 degrees to 95 degrees. Kernel moisture content

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the testing procedures used in Rotterdam are slightly different from those employed in the United States, the range found in Rotterdam is greater than that found in the U.S.

must be between 9% – 10%. Generally, a relative humidity 80% to 85% is necessary. Because of a process called "moisture migration" the moisture contained in certain peanuts can travel to other peanuts throughout the lot. Only the kernel moisture content in *some* peanuts must reach 9% in order for aflatoxin to develop; even if the *average* kernel moisture content is below the necessary level, individual peanuts within the lot could have the appropriate kernel moisture content for aflatoxin to develop. The growth of the mold takes approximately 24 hours, and aflatoxin production takes approximately 24 to 48 hours after the mold has developed.

Turning to the peanuts here, after they were harvested in the Sudanese fields, the peanuts were brought to the production plants of El Sheikh and Omer Osman. There the peanuts were sorted to remove any mouldy or otherwise damaged nuts. The peanuts were electronically sorted by a "Sortex" machine, a device used throughout the United States and Europe as well as the Sudan, which removes damaged peanuts and thereby reduces the overall level of aflatoxin in a given lot of peanuts. Gezira, a Sudanese governmental entity,[10] performed certain inspections on the peanuts as it did on all peanut cargoes exported from the Sudan. Gezira took samples of the peanuts from the producers' warehouses and delivered a subsample for analysis to the Sudanese National Analytical & Quality Control Laboratories operated by the Sudanese Government (the "National Laboratory").[11] Following testing, if the Sudanese National Laboratory determined that a particular lot of peanuts had aflatoxin levels below 5 p.p.b. it issued a certificate to that effect. In turn, Gezira issued a certificate and attached a copy of the Sudanese Laboratory's certificate. Gezira did not have its own aflatoxin laboratory and did not conduct any of its own aflatoxin test. In all, Gezira issued 20 certificates of inspection for the Raphaely peanuts, each of which stated that the aflatoxin levels were "nil."

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10 Gezira is actually an amalgam of several independent companies, formerly run by the British and Italians, and now nationalized by the Sudanese government. Gezira is not a party to this action.

11 Sudanese law required that all lots of peanuts be tested by the National Laboratory as a precondition for an export license.

Raphaely and Waterman contest the accuracy of these certificates. They do not claim that the certificates are knowingly fraudulent, although Waterman initially insinuated this, but rather that the aflatoxin tests performed on the peanuts do not accurately reflect the actual levels of aflatoxin present because the samples tested were not representative of the overall lots. In testing for aflatoxin, a sample is taken from each peanut lot, from which a sub-sample is then taken, and this subsample is comminuted (ground) and tested. The results of tests conducted on the sub-sample are then used, by extrapolation, to certify the quality of the entire lot. As a result, it is important that the sample be representative of the peanuts in the entire lot. The parties presented evidence of methods for sampling. It appears that sampling techniques vary in different countries of methods throughout the world. In the United States, in 1981, it was the practice to take the samples from 25% of the bags comprising a lot, while, in Holland, for example, 10% to 20% sampling is used. Gezira sampled 30%. Of this, Gezira ground subsamples of $1^1/_2$ to 2 kilos (3.3 to 4.4 pounds). In the United States, subsamples of 48 pounds are generally ground. Gezira's sampling technique was consistent with scientific norms—as "scientific" as such norms may be; indeed, it seems that the entire field of aflatoxin sampling, grinding, and testing is more of an art than a science—and even though Gezira's technique varied from that used in the United States, from the evidence, I conclude that it was not significantly less reliable. Thus, I conclude that the samples taken from the Raphaely peanuts, as the trade internationally sees it, were sufficiently representative of the overall lots, and the certificates of aflatoxin which issued fairly represented findings that the aflatoxin levels present in the various shipments of peanuts before loading was below 5 p.p.b.

Between April 6 and May 5, 1981 Waterman's agent, another branch of Gezira which performs the standard duties of a shipping line's agent, loaded the peanuts into lash barges which were towed offshore into fleeting areas and subsequently loaded abroad the three lash vessels, for transport to the United States.[12] The barges, it appears from the evidence, were loaded

12 Barge Nos. CGB-06, CG-843, WA-0120, WA1-270, LB-789, CGB-61 and WA3-592 were loaded from April 6 through April 9, 1981 with 34,998

in tight stow, leaving little room in each barge for ventilation. The bags appear to have been generally randomly placed, rather than stacked in rows, thereby closing off ventilation channels through the stow. The barges sometimes lacked proper dunnaging underneath the cargo and lacked sweat battens, wooden crosspieces fastened to the side frames of a barge. The Stonewall Jackson, the Benjamin Harrison, and the Robert E. Lee departed Port Sudan on April 11, April 25 and May 10, 1981 respectively.

The branch of Gezira acting as agent for Waterman in Sudan had issued order bills of lading for each barge.[13] The bills of lading stated that the goods were "received in apparent good order and condition . . ."[14]

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bags of peanuts (amounting to 2134.878 metric tons). These barges were subsequently loaded aboard the Stonewall Jackson which Jackson departed Port Sudan on April 11, 1981. Barge CG-951 was loaded with 5000 bags of peanuts (305 metric tons) on April 23, and April 24, 1981 and subsequently loaded on board the Benjamin Harrison which departed on April 25, 1981. Between May 3, and May 5, 1981 seven bags were loaded with 35,000 bags of peanuts (2,125 metric tons) and later loaded on board the Robert E. Lee and the vessel departed on May 10, 1981.

13 Order Bills of Lading Nos. K Norfolk 7 through 14, dated April 11, 1981, were issued for the barges loaded on the Stonewall Jackson. An Order Bill of Lading No. K Norfolk 9, dated April 25, 1981 was issued for the barge loaded on the Benjamin Harrison. Order Bills of Lading Nos. K Norfolk 1 through 11, dated May 7, 1981 were issued for the barges on the Robert E. Lee.

14 The bills of lading also contained express representations as to the exact condition of the cargo. The bills of lading K Norfolk 7 through 10 (Stonewall Jackson), K Norfolk 9 (Benjamin Harrison) , and K Norfolk 1 through 11 (Robert E. Lee) contained the following statement under "Description of Packages and Goods":

> BAGS SUDANESE HPS GROUNDNUT KERNELS, COUNT 70/80 PER OUNCE, 1980/81 CROP, PURE BASIS, FREE OF ANY ADMIXTURE, FREE OF SHRIVELLED KERNELS, FREE OF FLY/WEEVILS, FREE FROM DAMAGED AND DECAYED KERNELS, FREE FROM MOULD, CONTAINING MAXIMUM 3 PCT. SPLIT AND BROKEN NUTS. AFLATOXIN NOT EXCEEDING 5 P.P.B.

The bills of lading K Norfolk 11 through 14 (Stonewall Jackson) contained the following statement under "Description of Packages and Goods":

> BAGS SUDANESE GROUNDNUT KERNELS COUNT 70/80 HPS PER OUNCE 1980/81 CROP PURE BASIS FREE OF FLY/WEE-

After the barges were loaded, they were stowed offshore to a fleeting area to await the arrival of the mother vessel. Some of the barges sat in the fleeting area for several days. The climate in Port Sudan was hot an humid. Temperatures were well within the range necessary for the production of aflatoxin. The barges, constructed of steel, lay exposed to the heat of the sun in the fleeting area, so much so that the decks were hot to the touch—or as one witness testified, "too hot to walk on." The barges sat in shallow cool ocean water. Temperature gradients were created in the barges by the difference between the hot-decks above and the cool hulls below. These temperature gradients allowed for moisture migration. The entry of water into the barges in some cases from leaking hatch covers and leaking hulls had to have added to the moisture levels. The increased moisture levels permitted the production of aflatoxin.

Once the barges were loaded aboard the vessels, subsequent conditions further enabled the production of aflatoxin. The Waterman vessels were equipped with a forced air system of ventilation which pushed outside air through ventilation ducts into ventilation hoses inserted into vent openings in the barges. This system could only be used if the outside air was dry—and, as mentioned earlier, there were adequate ventilation channels through the stow. The vessels were unable to ventilate during periods of high humidity, fog, mist, or rain. Each of the three vessels shut down its ventilation system several times during

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VILS DAMAGE AND DECAYED KERNELS CONTAINING MAXIMUM 3 PERCENT SPLIT AND BROKEN NUTS FREE FROM MOULD.

I give no weight to these specific descriptions for its seems obvious that these were just a copying by a Gezira employee of what Gezira's shipping notices contained.

Waterman contests the authenticity of these bills of lading and offers different bills of lading which Waterman represents are the true bills of lading issued by Gezira on behalf of Waterman. Waterman's bills of lading, notably, do not contain the express representations as to the condition of the cargo. I previously rejected the bills of lading offered by Waterman on the parties' motions for summary judgment and I now again reject them for the same reasons. Namely, the bills of lading offered by Raphaely bear the signature of Gezira, a date of receipt, a duty stamp, and the signature of the shipper on the back, while bills of lading offered by Waterman are unsigned, undated, and unstamped.

the voyages due to these conditions. The vessels were not equipped with permanent or temporary dehumidification systems which would eliminate condensation and the accumulation of moisture and which could be used under any weather conditions. The barges lacked adequate bilges to pump out accumulating water. When the three vessels arrived at Norfolk on May 1, 14 and 29, 1981, the barges were off-loaded and remained in the harbor between 5 and 18 days before being unloaded. At the time, several barges contained standing water, and stained or wetted bags showing mould and mildew. Reports indicate that some barges had leaks in barge covers and barge bottoms, seepage through barge cover seams, missing gaskets from barge covers, and woven straw mats covering the floor.

Since prior to loading, the peanuts were inspected and found to contain no aflatoxin, which reports I accept, the levels of aflatoxin found upon outturn could only have developed while the peanuts were in the barges. Such a conclusion is supported by evidence of the manner of the stow and the conditions present in the barges and the vessels. The ventilation problem appears to have been exacerbated by the "sweating" or condensation of moisture which occurred, as it typically does, as the vessels here travelled from the warmer Sudanese climate to the cooler Virginia climate. Although Waterman contends that aflatoxin could not have developed during transit because the kernel moisture content prior to transport was 5% – 6%, and at outturn it was still only 6%, and therefore the kernel moisture content was never at the 9% level sufficient to produce aflatoxin, this argument fails. First, I note that no conclusive evidence was introduced to establish the kernel moisture content prior to transport. However, even assuming that such level was 5% – 6%, that level and certainly the kernel moisture content level measured at outturn was the *average* level of the overall lot. Regardless of the average kernel moisture content, so long as the kernel moisture content in *some* peanuts was the requisite 9%, aflatoxin could be produced in those peanuts, and those nuts ground into a sample [or samples] could materially affect the test results of the entire lot.

Raphaely's action against Waterman is governed by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300-

§1315. Under COGSA, a plaintiff establishes a prima facie case by proving (i) delivery of the goods to the carrier in good condition and (ii) outturn by the carrier in damaged condition. *Spencer Kellogg, Div. of Textron v. S.S. Mormacsea*, 703 F.2d 44, 46 (2d Cir. 1983); *Westway Coffee Corp. v. M.V. Netuno*, 675 F.2d 30, 32 (2d Cir. 1982). Raphaely has made out its prima facie case by proving that prior to loading, the aflatoxin levels in the peanuts were nonexistent or minimal and that the peanuts were free from beetle infestation. This showing flows from the certificates of inspection prior to loading. Twenty certificates were issued by Geriza stating the the peanuts had "nil" aflatoxin levels. Absent proof that the certificates were fraudulently issued, and there was no such proof, it strains credibility to believe that each and everyone of these examinations could have missed unacceptable aflatoxin at the time of shipment. Accordingly, on this record, Raphaely has made the requisite showing that the peanuts were delivered to Waterman in good condition. Raphaely also established that the cargo arrived in Port Norfolk in damaged condition, through the inspections and rejections issued by the U.S.D.A. at destination.

Once the plaintiff has made out a prima facie case, the carrier has the burden to rebut this evidence by establishing that (i) it exercised due diligence to prevent damage to the cargo, § 1303(1), (2), or that (ii) the harm resulted from an excepted cause. § 1304(2). *See Roman Crest foods, Inc. v. S.S. Delta Columbia Ex. S.S. Santa Clara*, 574 F.Supp. 440 (S.D.N.Y. 1983); *Woodhouse Etc. v. S.S. Hellenic Challenger*, 472 F.Supp. 31, 33 (S.D.N.Y. 1979); *C. Itoh & Co., Etc. v. Hellenic Lines, Ltd.*, 470 F.Supp. 594, 596 (S.D.N.Y. 1979). Waterman must show that before and at the beginning of the voyage, it exercised due diligence to make the ship seaworthy; properly man, equip, and supply the ship; and make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation. § 1303(1). A "seaworthy" vessel must be equipped with appropriate equipment to allow it to safely engage in the trade for which it was intended. *Amerada Hess Corp., Etc. v. S/T Mobil Apex*, 602 F.2d 1095, 1097 (2d Cir.

1979). Waterman admitted that it knew of the special requirements necessary for the carriage of peanuts, including keeping the cargo cool and dry. Waterman asserts that it was equipped to provide cargo space with the ventilation that Raphaely required. However, the evidence presented at trial makes clear that the Waterman lash barges were essentially poorly stowed, using only a forced air ventilation system, and thus were not appropriate for this transport.[15] Furthermore, the wait in tropical conditions for pick-up by the mother vessels, created additional risks. Knowing that peanuts require certain temperature and humidity controls, Waterman could have declined to transport the peanuts, or taken any number of steps to protect the cargo if it decided to accept it. Thus, Waterman is liable for the resultant damage. § 1303 (1) and (2).

I reject Waterman's claim that it is not liable for Raphaely's losses because the damage to the peanuts was caused by an inherent vice. A carrier can rebut a plaintiff's prima facie case by establishing that the loss resulted from "inherent defect, quality, or vice of the goods . . . § 1304(2)(m). *See Roman Crest* 574 F.Supp. at 442. An inherent vice is "any existing defect, disease, decay or the inherent nature of the commodity which would cause it to deteriorate over a lapse of time." *United States Steel International, Inc. v. Granheim*, 540 F.Supp. 1326, 1329-1330 (S.D.N.Y. 1982). *See Missouri Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 136, 138-1398 (1964). The fact that a cargo may be *susceptible* to disease, does not amount to an inherent vice. *Vana Trading Co., Inc. v. S.S. "Mette Skou"*, 556 F.2d 100, 104 (2d Cir. 1977). On the evidence before me I conclude that the development of aflatoxin here was not caused by any existing defect or inherent vice of the peanuts.

Turning to Raphaely's claim against Societe, I find, for the reasons stated below, that Societe is not liable for any of Raphaely's losses. Raphaely raises claims of breach of contract

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15 Indeed, several other shipments of peanuts into the United States aboard LASH barges were similarly rejected because of excessive aflatoxin levels. In contrast, shipments of peanuts aboard container vessels, which do not use the forced air ventilation system, arrived without problem.

and negligent inspection against Societe. However, the evidence at trial established that no contract existed between Raphaely and Societe, either for the inspection services which were performed or for any additional services to which Raphaely claims it was entitled. Gezira, issued the inspection certificates for Raphaely's peanuts. However, Gezira did so at the behest of the shipper, El Sheikh, prior to the sale to Agrimpex, not at the behest of Raphaely, and El Sheikh was invoiced for these services, not Raphaely. Gezira's sampling and issuance of inspection certificates, as discussed above, was not negligent.

Secondly, Raphaely claims that, in addition to the regular sampling and inspection services which Gezira always performs on peanuts for export, Raphaely had contracted with Societe for certain additional services including extra precautions in sampling and testing for aflatoxin. Raphaely represents that the contract for these additional services was agreed upon orally between Raphaely's vice president Eric Hoffman and Societe's Colin Kay and Adri Knoester, during Hoffman's visit to the Sudan in March 1981. Because the alleged contract was oral, with no writing to memorialize it, Raphaely submits several telexes between it and Societe in Geneva in which certain additional services are discussed. Although on a prior motion for summary judgment, I found that these telexes created a question of fact with regard to Societe's claim that no contract existed, the evidence at trial leads me to conclude that no contract for additional services was formed. The evidence established the Hoffman visited the Sudan, and with knowledge of the aflatoxin problem affecting several shipments of peanuts into the United States and aware that Societe had agreed to take additional measures on behalf of another purchaser, requested that Kay or Knoester agree to perform such services. However, no such agreement was ever finalized, because Kay and Knoester did not have authority to make such agreement, without prior approval from the Geneva office. Thus, Hoffman sought agreement from Geneva, but it was too late. Communication into and out of the Sudan was slow. The samples of Raphaely's peanuts had already been loaded aboard the Waterman barges, and one of the vessels, the Stonewall

Jackson, had already sailed. Accordingly, Societe did not agree to perform any additional services and no such services were performed. Raphaely was never invoiced by Societe for any such services and Raphaely made no payment to Societe. Accordingly, Raphaely's claims of breach of contract and negligent inspection are dismissed.

Accordingly, for the reasons stated above, I find Waterman, et al. to be liable under COGSA for Raphaely's losses. The claims against Societe are dismissed. The parties are to appear before me on January 24, 1992 at 12:00 for a conference on further proceedings herein. The foregoing constitutes the Court's findings of fact and conclusions of law and is so ordered.

Dated: February 20, 1991
New York, New York

/s/ RICHARD OWEN
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 CIV. 6284 (RO)

Filed March 2, 1992

RAPHAELY INTERNATIONAL, INC., VIA ASSURANCES, I.A.R.D. "NORD ET MONDE", *et al.*,

Plaintiffs,

—against—

WATERMAN STEAMSHIP CORPORATION, *in personam*, and the Vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, and their engines, boilers, etc., *in rem*, and SOCIETE GENERALE DE SURVEILLANCE, S.A.,

Defendants.

INTERLOCUTORY JUDGMENT

This action having come on for trial before the Honorable Richard Owen, United States District Judge, without a jury, on June 17, 1991, and the Court after due deliberation having rendered its decision in Opinion and Order No. 69068, dated December 13, 1991, entered by the Clerk of Court on December 19, 1991, amended on February 20, 1992 it is

ORDERED, ADJUDGED, AND DECREED, that defendant Waterman Steamship Corporation is liable *in personam*, and the vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE are liable *in rem*, for the losses sustained by plaintiffs Raphaely International, Inc., Via Assurances, S.A., I.A.R.D. "NORD ET MONDE", *et al.*

The Clerk of the Court is hereby directed to enter the judgment forthwith.

Dated: New York, New York
February 28, 1992

/s/ RICHARD OWEN
U.S.D.J.

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 3/4/92.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of September, one thousand nine hundred and ninety-two.

Present:

HON. FRANK X. ALTIMARI, HON. JOHN M. WALKER, *Circuit Judges*, HON. JOHN E. SPRIZZO, *District Court Judge*.

Docket No. 92-7393

Filed September 17, 1992

RAPHAELY INTL, ET AL,

—v.—

WATERMAN STEAMSHIP, ET AL.

A petition for rehearing having been filed herein by Appellants Waterman Steamship Corporation, Stonewall Jackson, Benjamin Harrison and Robert E. Lee.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of August, one thousand nine hundred and ninety-two.

Present:

HON. FRANK X. ALTIMARI, HON. JOHN M. WALKER, *Circuit Judges*, HON. JOHN E. SPRIZZO, *District Court Judge.**

Docket No. 92-7393

Filed August 14, 1992

RAPHAELY INTERNATIONAL, INC.; VIA ASSURANCE NORD MONDE; L'EUROPE; NAVIGATION & TRANSPORT; G.F.A.; CHASYR; NIEUW ROTTERDAM; Q.B.E.; PARISIENNE DE GARANTIE; BLACK SEA AND BALTIC; BOREAS; ALLIANZ; ALPINA; L'ALSACIENNE; ANCIENNE MUTUELLE; ASS. GENERALES PHENIX; ASTREE; C.A.M.A.T.; LE CONTINENT; LANGUEDOC; RHIN & MOSELLE; LLOYD CONTINENTAL; NANTAISE; ASSURANCES NATIONALES; NEW HAMPSHIRE; REUNION EUROPEENNE; REUNIONE ADRIATICA; SKANDIA; ASSURANCES GENERALES; NOUVELLE D'ASSURANCE; AND INDEPENDENCE,

Plaintiffs-Appellees,

—v.—

* Hon. John E. Sprizzo, United States District Court for the Southern District of New York, sitting by designation.

WATERMAN STEAMSHIP CORPORATION, in personam, and the Vessels STONEWALL JACKSON; BENJAMIN HARRISON, and ROBERT E. LEE, and their engines, boilers, etc., in rem,

Defendants-Appellants,

SOCIETE GENERALE DE SURVEILLANCE, S.A.,

Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

ELAINE B. GOLDSMITH, Clerk

By: ARTHUR HELLER
Arthur Heller,
Deputy Clerk

CARRIAGE OF GOODS BY SEA ACT
46 U.S.C. §§ 1300-1315

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§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

§ 1303. Responsibilities and liabilities of carrier and ship
Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

§ 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
(b) Fire, unless caused by the actual fault or privity of the carrier;
(c) Perils, dangers, and accidents of the sea or other navigable waters;
(d) Act of God;
(e) Act of war;
(f) Act of public enemies;
(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
(h) Quarantine restrictions;
(i) Act or omission of the shipper or owner of the goods, his agent or representative;
(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That

nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods

not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

§ 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such

surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

§ 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

§ 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in

connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

§ 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

§ 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

§ 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

§ 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

§ 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided, further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

§ 1313. Suspension of provisions by President

Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said

sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

§ 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

§ 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

Supreme Court, U.S.
FILED
JAN 8 1993
OFFICE OF THE CLERK

No. 92-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Waterman Steamship Corporation, *in personam*, and the Vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, *in rem*,

Petitioners,

—against—

RAPHAELY INTERNATIONAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS G. JULIANO
Counsel of Record
14 Wall Street
New York, New York 10005
(212) 732-4646

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Respondents

FREDERICK A. LOVEJOY, ESQ.
On the Brief

January 8, 1993

STATEMENT PURSUANT TO RULE 29.1

Plaintiff Raphaely International, Inc. was a wholly owned subsidiary of Leo Raphaely & Sons. Both Raphaely International, Inc. and Leo Raphaely & Sons have been wound up and no longer conduct business activities.

Plaintiffs Allianz Via Iardt; Allianz; Boreas S.A.; L'Europe; Lanquedoc; and Rhin & Mosselle are members of the Allianz Via Group which is publicly owned and is listed and traded on the Paris Stock Exchange. The Allianz Via Group is owned by Allianz A.G. which is publicly owned and is listed and traded on the Frankfurt Stock Exchange.

Plaintiff Alpina is a member of the Zurich Group which is publicly owned and is listed and traded on the Zurich Stock Exchange.

Plaintiff New Hampshire Insurance Co. is a subsidiary of the American International Group (AIG) which is publicly owned and is listed and traded on the New York Stock Exchange.

Plaintiff Skandia is an affiliate of the Skandia Group which is publicly owned and is listed and traded on the Stockholm Stock Exchange.

In respect to plaintiffs Navigation & Transport; G.F.A.; Chasyr; Nieuw Rotterdam; Q.B.E.; Parisienne De Garantie; Black Sea and Baltic; L'Alsacienne; Ancienne Mutuelle; Ass. Generales Phenix; Astree; C.A.M.A.T.; Le Continent; Lloyd Continental; Nantaise; Assurances Nationales; Reunion Europeenne; Reunione Adriatica; Assurances Generales; Nouvelle D'Assurance; and Independance, there are no parent or subsidiary companies which are required to be listed pursuant to Rule 29.1.

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court issue a *writ of certiorari* to review a determination of the Court of Appeals affirming a District Court decision holding that the development of aflatoxin in Respondents' cargo of peanuts was not caused by an existing defect or inherent vice of peanuts but rather was caused by Petitioners' negligent failure to provide seaworthy vessels and Petitioners' negligent failure to provide proper stowage and care of Respondents' cargo?

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COUNTERSTATEMENT OF THE CASE AND PROCEEDINGS BELOW

Pursuant to an ocean contract of carriage entered into with Respondents, Petitioners provided fifteen LASH barges which were carried aboard three LASH vessels, STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, to transport approximately 4500 metric tons of Sudanese peanuts from Port Sudan to Newport News, Virginia. The peanuts, earlier purchased by Respondents, were certified "aflatoxin nil" by the Sudanese National Analytical & Quality Control Laboratories following inspection and testing in Port Sudan. The District Court accepted certificates of inspection as proof of delivery to Petitioners in good order and condition of the peanuts upon loading. Upon arrival, the U.S. Department of Agriculture rejected ten of the fifteen bargeloads of peanuts for excessive aflatoxin thus establishing Respondents' *prima facie* case. The levels of aflatoxin found on outturn ranged in levels from 78 ppb (parts per billion) to 322 ppb.[1].

After fourteen days of trial, consisting of the live testimony of thirteen witnesses, including seven experts, the deposition testimony of twenty-four other witnesses, and hundreds of exhibits, the Court concluded that, because the LASH barges were improperly loaded, precluding proper ventilation, and were improperly equipped, lacking sweat battens and adequate bilges, the

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[1] In addition to aflatoxin contamination, the USDA also rejected five bargeloads of peanuts because of Khapra beetle infestation, found in one barge, for which Petitioners also were held liable. These peanuts were refused entry by the USDA and were retransported to Rotterdam where they were tested and also found to contain impermissibly high levels of aflatoxin, *i.e.*, 38 ppb. to 570 ppb.

aflatoxin contamination developed after the peanuts were loaded aboard and sealed inside the Petitioners' LASH barges. Furthermore, after loading, the barges were moored in fleeting areas offshore for days. There they were exposed to the sun. This produced temperature gradients[2] which permitted moisture migration to take place within the peanut cargoes.[3] Moisture migration was a factor in the production of the aflatoxin. Some barges also leaked, thus adding to the moisture levels. Although Petitioners represented that they knew of the special requirements for the proper carriage of peanuts and that their vessels were equipped to provide the cargo space and ventilation which was required, they, nevertheless, failed to provide the care mandated by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1936).

Not only were the LASH barges inadequate for the carriage of the peanut cargoes, but the District Court also found that conditions aboard the mother vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE further permitted the production of aflatoxin. Each mother vessel's ventilation system, which was connected to most, though not all, of the barges, was unable to be used during periods of high humidity, fog, mist, rain, sea spray, or dust storms. Due to these conditions, each of these vessels had to shut down its ventilation system several times during the voyage. The District Court also found that the vessels were not equipped with permanent or temporary dehu-

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[2] A temperature gradient is the difference in temperature between two points in a mass.

[3] The barges were also left in fleeting areas in Newport News from five to eighteen days following discharge from the mother vessels.

midification systems which could be used in any weather condition and which would have eliminated moisture accumulation in the barges.

Aflatoxin is a potent carcinogen, but it is *not* "naturally and unavoidably present in some foods" as stated in the Petition of Waterman (p. 3). This quote, taken from *Young v. Community Nutrition Institute*, 476 U.S. 974, 978 (1986), was not a finding made by the lower Court, but was a proposition agreed to by counsel. The issue in that case did not involve the origin or development of aflatoxin as does the case at bar; rather, it involved the interpretation of Title 21 U.S.C. § 346. Counsels' agreed proposition in that case is not controlling herein. To the contrary, the record in the instant case establishes that the development of aflatoxin can be prevented by controlling the environmental factors which cause molds to develop from spores, *i.e.*, controlling the temperature, humidity, aeration and the moisture content of the substrate.[4] It was Petitioners' failure to control these factors during the voyages in question that caused the production of aflatoxin. That negligence was causative; liability was properly imposed by the District Court.

A unanimous Court of Appeals affirmed the judgment of the District Court. A unanimous Court of Appeals also denied the petition for rehearing.

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[4] A substrate is any commodity which will support aflatoxin production, *e.g.*, peanuts, corn, rice, wheat, barley, soybeans, etc.

REASONS FOR DENYING THE WRIT

The Petitioners' argument should be rejected for the following reasons:

Petitioners, having failed in the District Court and Court of Appeals, now attempt to persuade this Court to issue a *writ of certiorari* to address a supposed conflict between two Circuits where no conflict actually exists.

Petitioners have submitted a very narrow issue, arguing that the standard applied by the Second Circuit to the definition of inherent vice approved by this Court in *Missouri Pac. R.R. v. Elmore & Stahl*, 377 U.S. 134 (1964), includes only the phrase following the disjunctive "or", *i.e.*, "the inherent nature of the commodity which would cause it to deteriorate with a lapse of time", (Petition of Waterman, p. 5) and that the standard applied by the Seventh Circuit in *Mulay Plastics, Inc. v. Grand Trunk Western R.R. Co.*, 822 F.2d 676 (7th Cir. 1987), to the definition of inherent vice includes the phrase preceding the disjunctive "or", *i.e.*, "any existing defects, diseases, decay." (Petition of Waterman, p. 6)

Respondents respectfully reiterate, there is no conflict between the Circuits. The standard applied by the Second Circuit includes the full definition of inherent vice, *i.e.*, the phrase before and after the disjunctive "or", as is evident by the following language appearing in *Vana Trading Co. v. S.S. METTE SKOU*, 556 F.2d 100, 104 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977).

> The Supreme Court has accepted a jury charge defining the latter term as " 'any existing *defects, diseases, decay or the inherent nature* of the commodity which will cause it to deteriorate with a lapse of time.' " *Missouri Pacific R.R. v. Elmore &*

> *Stahl*, 377 U.S. 134, 136, 138-39, 84 S.Ct. 1142, 1143, 12 L.Ed.2d 194 (1964). By using the term "susceptible" in this context Judge Pollack would seem to have meant only that the yams were particularly able to be affected by the conditions under which they were packed, stowed and unloaded and not that their condition was such that they would have deteriorated merely through "a lapse of time." *Moreover*, Judge Pollack found that "the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, *and not by any inherent defects*,". . . .

(emphasis added) (footnote omitted)

Similarly, the District Court's decision in the case at bar also included the full definiton of inherent vice, when it held:

> On the evidence before me I conclude that the development of aflatoxin here was not caused by any *existing defect* or inherent vice of the peanuts.[5]

(Petition of Waterman, p. 23a) (emphasis added)

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[5] Petitioners' argument that "aflatoxin" is an inherent vice is completely misplaced. Aflatoxin represents damage to cargo, *i.e.*, not a cause, an effect, *Schnell v. The VALLESCURA*, 293 U.S. 296, 305 (1934). An inherent vice is listed as an exception to COGSA under the subheading entitled "Uncontrollable causes of loss." (Petition of Waterman, p. 37a) The record in the trial below established that the development of aflatoxin is controllable. By controlling the environmental factors influencing sporilation, mold growth and toxin development, *i.e.*, the moisture content of the peanuts, the ambient temperature, the relative humidity and the degree of aeration, the development of aflatoxin can be prevented. Petitioners' negligence and unseaworthy vessels failed to control the environmental factors, all of which led to the development of excessive levels of aflatoxin for which they were properly held liable.

Vana Trading Co. v. S.S. METTE SKOU, *supra*, was cited by the District Court in support of its findings on inherent vice.

The District Court held Petitioners liable for violations of COGSA §§ 1303(1) and (2). The Court of Appeals for the Second Circuit held that the record on appeal contained ample evidence to support the District Court's findings of fact. The Court of Appeals held that "the district court reasonably concluded that the damage occurred while they were in Waterman's care." (Petition of Waterman, p. 11a)

Petitioners have studiously avoided advising this Court, in their Petition, that they were held liable because their vessels were unseaworthy, *i.e.*, not reasonably fit to carry the cargo which they had undertaken to transport, and that they were negligent in the stowage, care and custody of the cargo.

The Respondents made out their *prima facie* case by proving good order and condition of the peanuts upon loading, and arrival in damaged condition. Respondents, having carried their burden of establishing good order and condition of the cargo when shipped, *Vana Trading Co. v. S.S. METTE SKOU*, 415 F. Supp. 884 (S.D.N.Y. 1976), *rev'd on other grounds*, 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977), the burden shifted to the Petitioners, ocean carriers, to establish their non-culpability by proving that either the harm resulted from an excepted cause under § 1304(2), *e.g.*, inherent vice, or the damage was not due to their negligence, *i.e.*, that pursuant to §§ 1301(1) and (2) of COGSA, they exercised due diligence to make the ships seaworthy and properly handled, stowed and cared for the cargo. *American Tobacco Co. v. The KATINGO HADJIPATERA*, 81 F.

Supp. 438 (S.D.N.Y. 1948), *modified & aff'd as modified*, 194 F.2d 449 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952); *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426 (2d Cir. 1962); *Quaker Oats Co. v. M/V TORVANGER*, 734 F.2d 238 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

Petitioners never proved the excepted cause under § 1304(2). Not one witness or one document was offered to prove the defense of inherent vice.

In *Schnell v. The VALLESCURA*, 293 U.S. 296, 305 (1934), a Harter Act case involving damage to a cargo of Spanish onions, during an ocean voyage, this Court held:

> It is sufficient, if the carrier fails to show that the damage is from an excepted cause, *to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage*.

(emphasis added)

Petitioners did not carry the further burden set forth in *Schnell v. The VALLESCURA*, *supra*. On the contrary, the proof at trial established that the contamination of the peanut cargoes with aflatoxin, to the degree that they were ultimately rejected, began after they were loaded aboard and sealed inside the Petitioners' barges, where the unseaworthiness of all Petitioners' vessels and the failure to properly load and care for these cargoes caused the aflatoxin to develop to the excessive levels found upon outturn by the U.S. Department of Agriculture. The Court of Appeals held that those findings, based on ample evidence, were not clearly erroneous. Thus, because of their negligence, established at trial, Petitioners cannot prevail on the merits in this case.

Petitioners' second argument was mentioned by their counsel only as a final remark to the District Court during summation. No proof, however, was offered by Petitioners at trial. Nor was the argument raised in the Court of Appeals. It, therefore, has no standing to be heard in this Court. *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Lawn v. United States*, 355 U.S. 339 (1958). In addition, the argument lacks the requisite jurisdictional or fundamental character to qualify as an exceptional case, which may be heard, regarding questions not pressed or passed upon below. *Duignan v. United States*, 274 U.S. 195, 200 (1927).

The argument, in any event, is wholly without merit because it is based on the false premise that aflatoxin is an inherent vice. Petitioners argue, disingenuously, that since inherent vice is an excluded risk under the standard marine cargo insurance policy, Respondents had to procure insurance to cover aflatoxin rejection, thereby equating aflatoxin with the excluded risk of inherent vice. This is a *non sequitur*. Petitioners omit advising this Court that the insurance covered rejection for any reason whatsoever, *e.g.*, it covered rejection for Khapra beetle infestation, which is not an excluded risk, for which Petitioners were also held liable. The rejection that took place resulted not from an inherent vice of the cargo but from aflatoxin damage caused by the negligence of the Petitioners in failing to provide the care mandated by COGSA.

The risks envisioned by shipping interests before enactment of COGSA remain unchanged. H.R. Report 2218, cited by Petitioners (p. 7), contains a "Brief History of the Hague Rules," wherein the United States delegates, in recommending adoption of the Rule, said:

> We regard the rules as finally formulated at Brussels a beneficial advance upon anything heretofore known in respect of bills of lading. *The responsibility of carriers are materially increased; they will be obliged to cover additional risks by additional insurance.* . . .
>
> But such increase in carrier's responsibilities represents the united and insistent desire of shippers and cargo owners as well as of underwriters, *notwithstanding the fact that the same underwriters will continue to insure the same risks whether the same are assumed by carriers or cargo.*

H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1, at 4-5 (1936) (emphasis added)

The decision in this case has created no new allocation of risk. It correctly and properly held Petitioners at fault for violations of COGSA which are risks that have always been covered by marine underwriters.

CONCLUSION

The petition for a *writ of certiorari* should be denied.

Respectfully submitted,

LOUIS G. JULIANO
Counsel of Record
14 Wall Street
New York, New York 10005
(212) 732-4646

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Respondents

FREDERICK A. LOVEJOY, ESQ.
On the Brief

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